No. 80-1018

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES OF GIBSON COUNTY CIRCUIT COURT (Trial Court)

January 12, 1978 --	Come now the Plaintiffs by James M. Buthod and come also the Defendants by Charles R. Nixon and file Agreed Statement of Facts [Complaint] relative to the above entitled cause of action.
January 12, 1978 --	Come now the Plaintiffs by James M. Buthod and come also the Defendants by Charles R. Nixon and file Submission of Agreed Case relative to the above entitled action.
March 3, 1978 --	Cause comes on for hearing as to an agreed controversy pursuant to I.C. 34-1-29-1 et seq. and the Court ORDERS the parties to file briefs on the law, the Court taking same under advisement. Plaintiffs shall have 21 days to file Brief, defendants shall have 21 days to answer and plaintiffs shall have 10 days to reply. Clerk ordered to certify copy of this order to the Attorney General of the State of Indiana.
April 19, 1978 --	Comes now the attorneys for Walden and Walden and request an Extension of Time to and including Monday, April 24, 1978, within which to file their Reply Brief heretofore ordered filed within 21 days after the filing of the Brief of Consolidation Coal Company, Pond and Bobe. Granted.
June 2, 1978 --	Come now the parties by counsel for argument on Plaintiffs' Reply Brief in Response to Defendants' Trial Brief. Court now notes the filing by Plaintiff of Brief in Response to State's Amicus Curiae Brief. Issues are now submitted to the Court.

June 8, 1978 -- Louise F. Short files Petition to Intervene pursuant to Trial Rule 24 (B), and no objection being heard by the Court at this time, the petition is granted. Intervenor files Brief in this cause.

July 25, 1978 -- Court now enters the following order: IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the plaintiffs herein and against the defendants, that plaintiffs shall recover their costs expended, that plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the agreed facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests. Judgment accordingly. cc: of Order to all attorneys of record.

October 11, 1978 -- Come now the defendants, by counsel, and file Praecipe for Transcript of Record for Use on Appeal.

October 3, 1980 -- Comes now the Clerk of the Supreme Court and Court of Appeals and files Official Opinion of the Supreme Court of the State of Indiana which is in words and figures following, to-wit: (HERE COPY)

(H.I. Judgment of the Indiana Supreme Court submitted herewith on page 37)

December 5, 1980 -- Come now Eden H. Pond. Edna H. Bobe and Consolidation Coal Company and file Notice of Appeal to

the Supreme Court of the United States and Affidavit of Mailing and Proof of Service.

RELEVANT DOCKET ENTRIES OF INDIANA SUPREME COURT

January 26, 1979 --	Record of Proceedings [docketed].
January 4, 1980 --	Under Appellate Rule 10, Petition for Oral Argument is Granted. Givan, C. J. - - Oral Argument set for Tuesday, January 29, 1980, at 1:30 p.m., ½ hour on each side. -- Givan, C.J.
January 23, 1980 --	Judgments reversed and causes remanded for enforcement of the Act - DeBruler, J., Givan, C.J., Hunter. Prentice and Pivarnik, J. J., concur.
July 12, 1980 --	Appellee's Petition for Rehearing (9), Brief in Support (9), Notice (2), Affidavit of Mailing and Proof of Service (2).
September 24, 1980 --	Petition for Rehearing Denied. Givan, C.J.
December 5, 1980 --	Notice of Appeal to the Supreme Court of the United States (2), Affidavit of Mailing and Proof of Service (2).

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

IN THE GIBSON CIRCUIT COURT

EDEN H. POND	)	
EDNA H. BOBE	)	
CONSOLIDATION COAL COMPANY	)	
Plaintiffs	)	CAUSE NO. C-78-17
	)	
vs.	)	Filed January 12, 1978
	)	Russell Kern
ULYSSES G. WALDEN, JR.	)	Clerk of the Gibson
CAROLYN SALLEE WALDEN	)	Circuit Court
Defendants	)	

AGREED STATEMENT OF FACTS

The undersigned, Eden H. Pond, Edna H. Bobe, Consolidation Coal Company, Ulysses G. Walden, Jr. and Carolyn Sallee Walden, being all of the parties in the above entitled matter, as and for their Agreed Statement of Facts made out and signed by each of said parties in accordance with the provisions of Indiana Code 1971, Section 34-1-29-1, do hereby each stipulate, agree and represent the following to constitute a true, complete and accurate statement of all facts relevant to the existence and resolution of the controversy between the parties relating to the ownership of the mineral estate in and to the following described real estate situate in Gibson County, State of Indiana, more fully described as follows, to-wit:

> A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet

South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less,

and that the same comprise the entire Statement of Facts upon which said controversy is submitted to the Court for determination, said agreed facts being as follows:

1. On March 1, 1954, and for several years prior thereto, Clara M. Haper, Eden H. Pond and Edna H. Bobe were the owners, as tenants in common, each owning an undivided one-third interest, of the entire fee simple title in and to the following described lands in Gibson County, Indiana, to-wit:

The West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West of the 2nd Principal Meridian.

2. On said date, March 1, 1954, the said Clara M. Haper, a widow, Eden H. Pond and Eddie Pond, her husband, and Edna H. Bobe and Raymond W. Bobe, her husband, as Grantors, made, executed and delivered to Ulysses Walden and Mildred Walden, his wife, as Grantees, their certain warranty deed to the above described lands, which deed is recorded in Book 139 at page 169 in the Office of the Recorder of Gibson County, Indiana, and which deed contained a reservation of the mineral estate to the Grantors in the form shown by a copy of said deed, attached hereto as Exhibit "A".

3. Thereafter, under date of February 25, 1957, the said Grantors made, executed and delivered unto the same Grantees a certain correction warranty deed,

covering the above described lands, which correction warranty deed was recorded on February 28, 1957, in Deed Record 147, at page 25, in the Office of the Recorder of Gibson County, Indiana, and which contained certain corrections as more fully set forth in a copy thereof, attached hereto as Exhibit "B".

4. Thereafter, under date of August 13, 1959, Ulysses G. Walden and Mildred Walden, husband and wife, as Grantors, made, executed and delivered to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, husband and wife, as Grantees, their certain warranty deed covering a part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less, attached hereto as Exhibit "C", which deed was thereafter recorded in Book 153, page 296, in the Office of the Recorder of Gibson County, Indiana.

5. Thereafter, about the year 1958, the said Clara M. Haper died intestate, leaving as her sole and only heirs at law, her daughters, Eden H. Pond and Edna H. Bobe, who succeeded to the entire estate of Clara M. Haper with respect to the real estate above described; and the said Eden H. Pond and Edna H. Bobe are now, and have been since the death of the said Clara M. Haper, the owners as tenants in common, in equal proportions, of the entire mineral estate reserved by prior conveyances as above set forth, insofar as such reserved interests remain in force and effect.

6. Thereafter, under date of June 17, 1976, Eden H. Pond, Edna H. Bobe and Raymond W. Bobe, her husband, as Lessors, made, executed and delivered unto Consolidation Coal Company, as Lessee, a certain Coal

Mining Lease covering the Southwest Quarter of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, Gibson County, Indiana, a copy of which lease is attached hereto as Exhibit "D", and which lease was recorded in Miscellaneous Drawer 2, on Card 7648, in the Office of the Recorder of Gibson County, Indiana.

7. On March 4, 1977, by notice dated March 2, 1977, Ulysses Grant Walden, Jr. and Carolyn Sallee Walden gave written notice to Edna H. Bobe and Eden H. Pond, entitled "Notice of Lapse of Mineral Interest", a copy of which notice is attached hereto as Exhibit "E".

8. Said "Notice of Lapse of Mineral Interest" was published in the Princeton Daily Clarion one time, on March 4, 1977, as evidenced by the Publisher's Affidavit attached hereto and marked Exhibit "F".

9. Under date of May 27, 1977, Charles R. Nixon, as attorney for Ulysses Grant Walden, Jr., notified Consolidation Coal Company in writing of the claim of Ulysses Grant Walden, Jr., a copy of said letter of notification being attached hereto as Exhibit "G".

10. In the year 1971, the General Assembly of the State of Indiana enacted a certain statute, generally designated as the Mineral Lapse Act or the Dormant Minerals Act, which provisions were thereafter codified as Indiana Code, 1971, Section 32-5-11-1 through 32-5-11-8, which Act became effective with the promulgation of the acts of the General Assembly for the year 1971 early in the month of September, 1971. A copy of the provisions of said Act are, for convenience of reference, attached hereto as Exhibit "H".

11. Plaintiffs have not at any time filed a statement of claim as provided for in said Mineral Lapse Act.

12. None of Plaintiffs have done or performed any acts which would constitute the "use" of the reserved mineral estate, as the term "use" is defined in Indiana Code 1971, Section 32-5-11-2. None of Plaintiffs have paid any taxes with respect to said reserved mineral estate nor have taxes been separately assessed with respect to said reserved mineral estate at any time.

13. Consolidation Coal Company has complied with all the terms, conditions and provisions necessary to keep its Coal Mining Lease in full force and effect with respect to the interests of Eden H. Pond and Edna H. Bobe, and the same is a valid and subsisting lease covering said interests as the same may eventually be established.

14. The reservation of the mineral estate contained in Exhibit "A" and Exhibit "B" attached hereto was intended to and was sufficient to reserve the entire mineral estate with respect to both coal and other solid minerals and oil, gas and other fugacious minerals and was a valid reservation thereof at the time such reservation was made.

15. With the exception of Exhibit "H", which is hereby stipulated to be a true, correct and accurate copy of the provisions of the Indiana Mineral Lapse Act as the same appear in Burns Indiana Statutes Annotated, Code Edition, Sections 32-5-11-1 through 32-5-11-8, each of the Exhibits attached hereto is hereby stipulated to be a true, correct and accurate copy of the document which it purports to be; and each of said documents is stipulated to be authentic and the signatures thereon to be genuine; and each of said documents is stipulated to be a valid and subsisting instrument in accordance with the tenor thereof.

16. The Plaintiffs, Eden H. Pond and Edna H. Bobe, are the owners, as tenants in common, in equal proportions, of the entire mineral estate in and to the above described real estate, subject only to the Coal Mining Lease to Consolidation Coal Company on a portion thereof, unless their interest therein has been terminated by operation of the Mineral Lapse Act, above designated; and each of said Plaintiffs assert that said Mineral Lapse Act is inoperative to terminate the interest of said Plaintiffs by reason of its unconstitutionality, inapplicability and otherwise as more fully set forth in the brief of said Plaintiffs.

17. Defendants assert that the provisions of the Mineral Lapse Act have terminated all rights of Plaintiffs

with respect to the mineral estate in and to the lands above described, and that by reason thereof, such mineral estate has reverted to the estate from which it was carved, said estate from which it was carved being now owned solely by Defendants as tenants by the entireties; and Defendants assert the constitutionality and applicability of said Mineral Lapse Act as more fully set forth in the brief of Defendants

The parties further stipulate that the sole issue for determination in this cause is the constitutionality of the provisions of Indiana Code 1971, Section 32-5-11-1 through 32-5-11-8, inclusive, under the Constitutions of the United States of America and of the State of Indiana and under each and all of the applicable provisions of said Constitution as such provisions of the Indiana Code 1971 may be applied or be applicable to the Agreed Statement of Facts above set forth. If such provisions are constitutional and applicable with respect to grants or reservations made prior to the effective date of the Act, then Defendants must prevail and all title of Plaintiffs with respect to the subject real estate will have terminated. If, on the other hand, the provisions of said Indiana Code Sections are unconstitutional as applied to the Agreed Statement of Facts, then Plaintiffs must prevail and Defendants' rights with respect to the subject real estate are subject to the mineral reservations heretofore made and now owned by Plaintiffs, to the extent of the form and manner of such reservations.

Each of the undersigned parties therefore stipulate that the above and foregoing constitutes an Agreed Statement of Facts upon which the said controversy among the parties shall be determined, each of such parties executing this Agreed Statement of Facts on the dates set opposite their respective signatures below.

November 17, 1977 — /S/ Eden H. Pond
DATE — Eden H. Pond

November 17, 1977 — /S/ Edna H. Bobe
DATE — Edna H. Bobe

CONSOLIDATION COAL COMPANY

December 2, 1977 — By: /S/ George G. Schneider
DATE — Senior Vice President

December 12, 1977 — /S/ Ulysses G. Walden, Jr.
DATE — Ulysses G. Walden, Jr.

December 12, 1977 — /S/ Carolyn Sallee Walden
DATE — Carolyn Sallee Walden

EXHIBIT "A"
To Agreed Statement of Facts

WARRANTY DEED

THIS INDENTURE WITNESSETH, That Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, of Gibson County, Edna H. Bobe and Raymond W. Bobe, her husband, of Knox County, all in the State of Indiana

CONVEY AND WARRANT

to Ulysses Walden and Mildred Walden, his wife, of Gibson County, in the State of Indiana, for the sum of One Dollar and other valuable consideration, the receipt whereof is hereby acknowledged, the following described real estate, situate in Gibson County, in the State of Indiana, to-wit:

The West one-half of the Northwest Quarter of Section Number Thirty-Four (34), Township One

(1) South, Range Ten (10) West, containing eighty acres more or less. Provided always the grantors reserve unto themselves all mineral rights underlying the above described real estate with the right to explore the same, and to sell the same and remove them from said real estate, without any charge whatever. The Grantees assume and agree to pay the taxes assessed against real estate for the year 1954 and payable May and September of said year and thereafter. Provided always, again that any Lessee or the Grantors herein for the purpose of developing and/or exploring any and all mineral rights underlying the above described real estate shall pay to the Grantees all damages done to the above real estate by reason of making a road or roads over and through the above described real estate which may be reasonable in amount not to exceed One Hundred Dollars ($100.00) per acre.

IN TESTIMONY WHEREOF, the said Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, Edna H. Bobe and Raymond W. Bobe, her husband, have hereunto set their hands and seals this 1st day of March 1954.

/S/ Clara M. Haper
Clara M. Haper

/S/ Edna H. Bobe
Edna H. Bobe

/S/ Eden H. Pond
Eden H. Pond

/S/ Raymond W. Bobe
Raymond W. Bobe

/S/ Eddie C. Pond
Eddie C. Pond

(Acknowledgement omitted)

EXHIBIT "B"
To Agreed Statement of Facts

WARRANTY DEED

THIS INDENTURE WITNESSETH that Clara M. Haper, a widow, Eden H. Pond and Eddie C. Pond, her husband, of Gibson County, State of Indiana, and Edna H. Bobe and Raymond W. Bobe, her husband, of Knox County, State of Indiana, Convey and Warrant to Ulysses Walden and Mildred Walden, his wife, of Gibson County, State of Indiana, for the sum of One Dollar ($1.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the following described real estate situated in Gibson County, in the State of Indiana, to-wit:

> The West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West containing 80 acres, more or less; provided always the Grantors reserve unto themselves all mineral rights underlying the above described real estate with the right to explore the same and to sell the same and remove them from said real estate without any charge whatever; provided always again that any Lessee of the Grantors herein for the purpose of developing and/or exploring any and all mineral rights underlying the above described real estate, shall pay the Grantees all damages done to the above real estate, and to any improvements thereon, including any road or roads over and through the above described real estate which may be reasonable in an amount not to exceed $100.00 per acre.

This deed is made to correct an error relative to the item of damages, if any, caused in the future by the developing and/or exploring for any minerals underlying said real estate, such former deed bearing date of March 1, 1954, and recorded in Deed Record 139, page 169, in the Office of the Recorder of

said county, it having been the intention of the parties by such prior deed to convey and include the damages hereinabove set forth.

In testimony whereof, the said Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, and Edna H. Bobe and Raymond W. Bobe, her husband, have hereunto set their hands and seals this 25th day of February, 1957.

/S/ Clara M. Haper
Clara M. Haper

/S/ Edna H. Bobe
Edna H. Bobe

/S/ Eden H. Pond
Eden H. Pond

/S/ Raymond W. Bobe
Raymond W. Bobe

/S/ Eddie C. Pond
Eddie C. Pond

(Acknowledgement Omitted)

EXHIBIT "C"
To Agreed Statement of Facts

WARRANTY DEED

THIS INDENTURE WITNESSETH, That Ulysses G. Walden and Mildred Walden, husband and wife, of Gibson County, in the State of Indiana

CONVEY AND WARRANT

to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, husband and wife, of Gibson County, in the State of Indiana, for and in consideration of One Dollar ($1.00), the receipt whereof is hereby acknowledged, the following described real estate in Gibson County, in the State of Indiana, to-wit:

A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less; and

Also, a strip of ground of the uniform width of 12½ feet off of the West side of the East Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, the West line of which coincides with the West line of said half quarter section;

Also, the West Half of the Southwest Quarter of Section 34, Township 1 South, Range 10 West, containing 80 acres more or less, subject to oil and gas reservation shown at deed record 119, page 313.

The grantees herein, as the consideration of this conveyance, hereby assume and agree to pay a certain mortgage against said real estate and other lands dated January 21, 1959, and acknowledged and recorded on said day in Mortgage Record 180, at page 453, of the records in the Office of the Recorder of Gibson County, in the State of Indiana, the same being in the original principal sum of $12,324.00, and upon which there is now due and upaid the sum of $12,050.92 and said grantees further assume and agree to pay the indebtedness secured by said mortgage.

The grantees agree to pay the taxes against the real estate described in said mortgage beginning with the November installment of the 1958 taxes, payable to November, 1959, and thereafter.

IN WITNESS WHEREOF, the said Ulysses G. Walden and Mildred Walden, husband and wife, have hereunto set their hands and seals, this 13th day of August, 1959.

/S/ Ulysses G. Walden
Ulysses G. Walden

/S/ Mildred Walden
Mildred Walden

(Acknowledgement Omitted)

EXHIBIT "D"
To Agreed Statement of Facts

FORM L 76 (1)

COAL MINING LEASE

THIS LEASE, made this 17th day of June, 1976, BETWEEN Eden H. Pond, a widow, and Edna H. Bobe and Raymond W. Bobe, her husband, whose address is 613 S. Prince Street, Princeton, Indiana, hereinafter called the "Lessor" and CONSOLIDATION COAL COMPANY whose address is 3300 One Oliver Plaza, Pittsburgh, Pennsylvania 15222, hereinafter called the "Lessee".

1. LEASE OF COAL AND EXPLORATION RIGHTS: Lessor, for and in consideration of the sum of Two Hundred and No/100 Dollars ($200.00) advance royalty in hand paid, and of the royalties to be paid by Lessee and the agreements to be performed by Lessee, does hereby grant, lease and let exclusively unto Lessee, its successors and assigns, all of the coal and other materials which are necessarily removed in the

coal mining process (the "coal") in and underlying the following described lands situated in Gibson County, Indiana, to-wit:

The Southwest Quarter of the Northwest Quarter of Section 34, Township 1 South, Range 10 West.

CONTAINING 40 acres, more or less, (hereinafter called the "premises"). Premises shall also include all of the coal in and under all land or interests therein owned or claimed by Lessor contiguous or appurtenant to said described lands. TOGETHER WITH the exclusive right of Lessee (alone or conjointly with coal under neighboring lands) to mine and remove all of said coal and the free and uninterrupted right and right-of-way into, through and under the said land at such points and in such manner as may be convenient or necessary for the purpose of all operations in said coal and in the horizons thereof, and the strata above or below the same, and in other coal now owned or leased or hereafter acquired by Lessee, its successors or assigns, including the right to explore, test drill, dig, mine, drain, ventilate, transport and carry away said coal and other materials and other coal and materials now owned or leased or which may hereafter be acquired by Lessee, its successors or assigns, by any mining methods or machinery now or hereafter employed without being required to lease or provide subjacent or sublateral support for the overlying strata or surface or anything therein, thereon or thereunder. Lessee shall have the right to enter upon the surface of the land, to operate, maintain and finally remove such facilities and services (including but not limited to those required to provide power, communication, transportation, ventilation and drainage) as may be necessary or convenient for the prosecution of the mining operations hereunder, with rights of ingress, egress and regress to and from the same. Water pipe lines shall be buried by Lessee below plow depth, and wherever practical boreholes and other facilities shall be located near fence and property lines. Lessee shall pay for damage caused by it to the growing crops on the leased premises. It is understood and agreed that the rights hereinbefore mentioned are in enlargement and not in restriction of the rights incidental

to the ownership of said coal.

2. TERM: Unless sooner terminated as herein provided, this lease is for an initial term of 20 years from date (and, if extended as provided in paragraph 3, for an additional term of 20 years) and so long thereafter as mining operations are being conducted by or for Lessee on, or within ten miles of any boundary of the premises.

3. ADVANCE ROYALTIES: Until mining operations are commenced to remove the coal underlying the premises, Lessee shall pay or tender to Lessor as advanced royalty during the initial term the sum of $5.00 per acre for the first year of this lease, and thereafter the sum of $2.00 per acre per year commencing one year from the date hereof, with a like payment payable on or before each anniversary date of this lease for the second through the nineteenth anniversary dates. If mining operations have not been commenced on the premises within 20 years from the date hereof, Lessee may further extend the term of this lease by paying to Lessor on or before the twentieth anniversary the sum of $10.00 per acre, and thereafter on or before each subsequent anniversary date the sum of $4.00 per acre until mining operations are commenced on the premises. All advance royalties are fully recoupable by Lessee from earned royalties.

4. EARNED ROYALTIES: After Lessee has commenced or caused to be commenced actual mining operations in, and/or under the premises, all further liability for advanced royalties shall forthwith terminate, and Lessee will thereupon pay or credit to Lessor earned royalty for all coal mined and sold from the premises the sum of 15¢ per ton of 2,000 pounds or 2.5% of the average gross realization price f.o.b. mine, whichever is the greater. Railroad weights shall be taken as the basis for payment of such earned royalty when coal is loaded and weighed on railroad cars, and when not so loaded and weighed, then other fair and accurate weights and measurements shall be taken as the basis for payment. Earned royalties shall be paid or credited on or before the thirtieth day following the close of any calendar month. The quantity and quality of coal removed from the premises shall be in the sole discretion of

the Lessee, and no royalty shall be paid on any unmerchantable coal or other materials removed as a part of the mining process. If the coal is used by Lessee in its own operation or sold to an affiliated company, the price used in the computation of earned royalty shall be the reasonable market value of similar coal produced in the area and sold at arm's length. For the purpose of this lease, "gross realization price" shall mean the price for that coal produced, saved and sold by the Lessee from the leased premises, exclusive of any sales, severance, land or other taxes not based on net income, and any other cost or levy resulting from any governmental statute or regulation.

5. RECORDS: Lessee shall keep a true and correct record of all coal mined, removed and sold from the premises and Lessor at all reasonable times shall have the right to inspect the same. All statements rendered by Lessee for earned royalty or advance royalty shall be conclusive and final two years from the time of rendition as to the quantity of coal mined, removed and sold and/or royalty due during such period unless written objection shall be made by Lessor within such period.

6. MINING OPERATIONS: Lessee agrees to conduct all mining operations in compliance with the regulations and laws of the State of Indiana and the United States. Lessee shall not be required to maintain a barrier pillar in the coal between the leased premises and any contiguous coal owned, leased or controlled by Lessee.

7. TITLE OF LESSOR: Lessor warrants that Lessor holds merchantable title to the leased premises in fee simple free and clear of all liens and encumbrances, except such as may be hereinafter noted; that Lessor has the lawful right to make this lease, and that Lessee will have peaceable possession of the premises for the full term of this lease. Lessor shall deliver to Lessee upon request any abstracts or title papers which it may have and Lessee shall be privileged to duplicate or reproduce such abstracts and title papers and to retain the originals for a reasonable time. Without impairment of Lessor's warranty and subject to all other provisions hereof, it is agreed that if objections be found to Lessor's title, Lessor

shall cooperate with Lessee in satisfying such objections, and further that Lessee may take such steps as it deems necessary to remedy such title defects. If said Lessor owns a lesser interest in the above described land than the entire and undivided fee simple estate therein, then the royalties herein provided shall be paid the Lessor only in proportion which his interest bears to the whole undivided fee. If any dispute shall arise as to Lessor's ownership of the coal, Lessee may without liability suspend payments until such ownership is finally determined.

8. TAXES AND LIENS: Lessor covenants to pay all taxes and assessments upon the land and the coal hereby leased, but each party shall pay its own share of any production or severance taxes. Lessee shall have the right to pay any delinquent mortgage, tax, lien, encumbrance, or assessments on the premises, and same may be deducted from future advance royalties or from earned royalties.

9. TERMINATION: If either Lessee or Lessor shall default in the performance of any of the covenants, agreements or provisions of this lease, and such default shall continue for sixty (60) days after written notice of such default to the aggrieved party to the other party, said aggrieved party shall have the option of cancelling and terminating this lease. Lessee shall have the right to terminate this lease (in whole or in part) at any time by paying all royalties then due and giving Lessor sixty (60) days written notice of such intention. In such event, Lessee shall execute and record at Lessee's expense, a proper release of this lease, and except as otherwise herein specifically provided both parties shall thereupon be released from all obligations hereunder. Lessee shall have the right to remove any of its property from the premises within one (1) year after the termination of this lease. Lessee's right to utilize underground tunnels under the premises shall continue for so long as mining operations are conducted on, or within ten miles of, the premises.

10. NOTICES AND PAYMENTS: All payments herein provided for may be made by mailing the same to Lessor or by paying or tendering to Eden H. Pond, 613 S. Prince Street, Princeton, Indiana 47670, or her successors, which shall con-

tinue as the depository regardless of the changes in ownership of said land, applicable sums of advanced or earned royalties. If said bank shall fail or refuse to accept payments, Lessee shall not be held in default until sixty (60) days after receipt from Lessor of a recordable instrument designating a different depository bank. In the event payments are made directly to Lessor, Lessee shall not be held in default until sixty (60) days after receipt from Lessor of a recordable instrument designating a new address of Lessor. All payments sent to the last known address of Lessor shall constitute payment hereunder. Any notice required or permitted hereunder may be served personally or by certified or registered mail on the parties at the addresses shown above or such other address as may be communicated to the parties in writing. No change in ownership of the premises or royalties hereunder shall be binding on Lessee until Lessor has furnished Lessee with either the original recorded instrument of conveyance or a certified copy thereof sufficient to show a complete chain of title in the Lessor.

11. FORCE MAJEURE: Mining shall not be deemed to have "terminated" or "ceased" and it shall be deemed that coal is being mined if mining or mining operations are suspended or are prevented or prohibited by law, ordinance or other governmental regulations, restraint or court order, by inability to obtain permits or licenses, by scarcity or inability to obtain equipment, material, power or fuel, by strike, lockout or industrial disturbance, by failure of carriers to transport or furnish facilities for transportation, by operation of force majeure (including, without limitation, lightning, earthquake, fire, storm, flood, washout), by breakage or accident to machinery or facilities, or by any cause beyond Lessee's control, provided that Lessee shall exercise reasonable diligence to resume mining operations. Lessee shall have the right to determine and settle any strikes, lockouts or industrial disputes in its sole discretion, and the aforesaid requirement of exercising reasonable diligence to resume mining shall not require Lessee to accede to any demand or position of any other party involved in such strike, lockout or industrial dispute.

12. PARTIES: This lease shall be binding upon and shall

inure to the benefit of the parties hereto, their heirs, successors, personal representatives and assigns. The Lessor does hereby waive and release any rights of dower and homestead in the premises insofar as such rights may in any way be affected hereby. Whenever the context requires, the singular shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders. Unless otherwise designated, any party who signs this lease shall be deemed a Lessor whether or not named in the body of this lease, and any party who signs this lease accepts its terms as to his or its interest regardless of whether or not all named parties shall execute this lease.

13. AMENDMENT: Paragraph 3 hereinabove is hereby amended in that unless this lease is terminated as hereinprovided Lessee will pay an advance royalty of $5.00 per acre per year for 20 years and if extended for an additional 20 years Lessee will pay an advance royalty of $5.00 per acre per year.

IN WITNESS WHEREOF, Lessor has executed this Coal Mining Lease as of the day and date first above written.

/S/ Eden H. Pond (Seal) /S/ Edna H. Bobe

S.S. Number 303-10-0697 S.S. Number 308-40-4713

(Seal) /S/ Raymond W. Bobe

S.S. Number 311-18-6543

(Acknowledgement Omitted)

EXHIBIT "E"
To Agreed Statement of Facts

NOTICE OF LAPSE OF MINERAL INTEREST

TO: Edna H. Bobe
Main Street Rd.
Vincennes, Indiana 47591

Eden H. Pond
613 S. Prince St.
Princeton, Indiana 47670

1. The undersigned, successors in interest to the mineral interest hereinafter described, hereby give notice pursuant to Indiana Code 1971, 32-5-11-6 as added by Acts 1971, Public Law 423, § 1, p. 1970, in order to extinguish of record the mineral interest hereinafter described by reason of a lapse thereof under the provisions of said act.

2. The interest extinguished is that interest created by a reservation in favor of the Grantors in that certain Warranty Deed dated March 1, 1954, and recorded in Deed Record 139, Page 169, in the Office of the Recorder of Gibson County, Indiana, wherein Ulysses Walden and Mildred Walden, husband and wife, were Grantees and Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, and Edna H. Bobe and Raymond W. Bobe, her husband, were Grantees by which reservations the Grantors reserved unto themselves all mineral rights underlying the real estate hereinafter described with the right to explore the same and sell the same and remove them from said real estate which real estate is located in Gibson County, Indiana, and described as follows:

> The West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, containing eighty (80) acres, more or less.

3. The Owners of such mineral interest, as shown of record, now are Edna H. Bobe and Eden H. Pond.

4. The undersigned are now the owners of the following described real estate located in Gibson County, in the State of Indiana, to-wit:

> A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less.

which includes a part of the real estate described in paragraph 2 above.

5. The records in the Office of the Recorder of Gibson County, Indiana, show that you have not filed in the Office of said Recorder a statement of claim as required by the provisions of the Indiana Code 1971, 32-5-11-4 as added by Acts 1971, Public Law 423, § 1, p. 1970.

6. This notice is given by the undersigned, the owners in fee simple of the above described real estate.

DATED this 2nd day of March, 1977.

/S/ Ulysses Grant Walden, Jr.
ULYSSES GRANT WALDEN, JR.

/S/ Carolyn Sallee Walden
CAROLYN SALLEE WALDEN

EXHIBIT "F"
To Agreed Statement of Facts

PUBLISHER'S AFFIDAVIT

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

Personally appeared before me, a Notary Public, in and for said County and State, the undersigned Edward C. Cochrane who, being duly sworn, says that he is Publisher of the Princeton Daily Clarion, a daily newspaper of general circulation printed and published in the English language in the City of Princeton, Indiana, in state and county aforesaid, and that the printed matter attached hereto is a true copy, which was duly published in said paper for 1 time, the dates of publication being as follows: March 4, 1977.

/S/ Edward C. Cochrane

Subscribed and sworn to before me this 4th day of March, 1980.

/S/ Jean Harder
Notary Public

My commission expired 9-9-80.

EXHIBIT "G"
To Agreed Statement of Facts

Law Offices
McDONALD, McDONALD & NIXON
Box 400
120 South Main Street
PRINCETON, INDIANA
47670

May 27, 1977

Consolidation Coal Company
3300 One Oliver Plaza
Pittsburgh, Pennsylvania 15222

In Re: Coal Mine Lease with Edna H. Bobe and Eden H. Pond as Lessors

Gentlemen:

Our office represents Ulysses Grant Walden, Jr., the owner of certain real estate in Gibson County, Indiana, on which your comp y took a coal mining lease from the above Lessors.

On March 4, 1977, Ulysses Grant Walden, Jr., served Notice of Lapse of Mineral Interest on Edna H. Bobe and Eden H. Pond pursuant to Indiana Code 1971 32-5-11-4. More than sixty (60) days have now elapsed and no statement of claim has been filed by the record owners of that mineral interest namely, Eden H. Pond and Edna H. Bobe. Their interest, therefore, elapsed.

At the time you obtained this lease, the Lessors' interest in the minerals had lapsed all of which your company knew about and accordingly the Lessors in that Lease had no interest to lease.

Therefore, this letter is a demand that you execute a

Release of the coal mining lease and remove the cloud from the title of Ulysses Grant Walden, Jr. and his wife. If this is not done on or before June 10, 1977, we shall assume that it will be necessary to file a Quiet Title Action.

Thank you.

Very truly yours,

McDONALD, McDONALD & NIXON

By /S/ Charles R. Nixon
Charles R. Nixon

CRN/gs

EXHIBIT "H"
To Agreed Statement of Facts

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

32-5-11-1 [46-1808]. Lapse of mineral interest - Prevention. - Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. [IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-2 [46-1809]. Mineral interest - Definition. - A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. [IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-3 [46-1810]. Use of mineral interests - Definition. - A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage

or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument. [IC 32-5-11-3, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-4 [46-1811]. Statement of claim - Filing - Requirements. - The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. [IC 32-5-11-4, as added by Acts 1971, P.L. 423, § 1; 1972, P.L. 11, § 15.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest - Exceptions. - Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) Made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section four [32-5-11-4] preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) Failed to preserve such interest through inadvertence, and;

(4) Filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 32-5-11-5, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-6 [46-1813]. Successor in interest - Notice requirements - Prima facie evidence. - Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 32-5-11-6, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-7 [46-1814]. Statement of claim - Filing - Recorder's duty. - Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the

county where such interest is located, the Recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 32-5-11-7, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions - Time limit. - The provisions of this chapter may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 32-5-11-8, as added by Acts 1971, P.L. 423, § 1.]

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

IN THE GIBSON CIRCUIT COURT

EDEN H. POND	)	
EDNA H. BOBE	)	
CONSOLIDATION COAL COMPANY	)	CAUSE NO. C-78-17
Plaintiffs	)	Filed January 12, 1978
	)	Russell Kern
vs.	)	Clerk of the
	)	Gibson Circuit Court
ULYSSES G. WALDEN, JR.	)	
CAROLYN SALLEE WALDEN	)	
Defendants	)	

SUBMISSION OF AGREED CASE

Come now the Plaintiffs by James M. Buthod of the Law Offices of James M. Buthod, attorneys for Plaintiffs, and come also the Defendants by Charles R. Nixon, of the

Law Offices of McDonald, McDonald and Nixon, attorneys for Defendants (said parties being respectively designated "Plaintiffs" and "Defendants" for convenience of reference, notwithstanding the submission hereof as an Agreed Case), and pursuant to the provisions of Indiana Code 1971, Sections 34-1-29-1 and following, the said parties submit to the Court as an Agreed Case a matter of controversy between Plaintiffs and Defendants, to-wit:

Determination and declaration of the ownership of the mineral estate in and to the following described real estate situate in Gibson County, State of Indiana, more fully described as follows, to-wit:

> A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less,

as more fully set forth in the Agreed Statement of Facts made out and signed by the parties and attached hereto.

Attached hereto and made a part of this submission are each of the following:

1. The Agreed Statement of Facts made out and signed by the parties, together with the exhibits attached there-

to, which exhibits are stipulated to be true and correct copies of the instruments which they respectively purport to be.

2. Affidavits by each of the parties that the controversy here involved is real and that these proceedings are brought in good faith to determine such controversy.

3. Appearances by the respective parties in person and appearances of counsel, and waiver of the insurance and service of process by each of the parties, whether designated as Plaintiffs or Defendants.

Inasmuch as Plaintiffs allege the unconstitutionality of a certain statute of the State of Indiana, being the so-called Mineral Lapse Act or Dormant Minerals Act, Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, inclusive, and seek declaratory relief, therefore in accordance with the Indiana Code Section 34-4-10-11, the Attorney General of the State of Indiana has been served with a copy of these proceedings and is entitled to be heard herein.

The parties, therefore, pray the Court to determine, upon the basis of the Agreed Statement of Facts and Exhibits attached thereto, the constitutionality of the provisions of Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, inclusive, as the same may be applied to the Agreed Facts herein, to declare the rights of the respective parties with respect to the ownership of the mineral estate in and to the above described land, and to enter judgment declaring such rights accordingly and for such other and further relief and determinations as to the Court may seem proper in the premises.

Respectively submitted,

LAW OFFICES OF
JAMES M. BUTHOD

By: /S/ James M. Buthod
James M. Buthod
Attorney for Plaintiffs

McDONALD, McDONALD & NIXON

By: /S/ Charles R. Nixon
Charles R. Nixon
Attorney for Defendants

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Princeton, IN 47670
Telephone: (812) 385-4816

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

IN THE GIBSON CIRCUIT COURT
1978 TERM

EDEN H. POND	)	
EDNA H. BOBE	)	
CONSOLIDATION COAL COMPANY	)	CAUSE NO. C-78-17
Plaintiffs	)	ORDER ENTRY, JULY 25, 1978
vs.	)	
	)	Filed July 24, 1978
ULYSSES G. WALDEN, JR.	)	Russell Kern
CAROLYN SALLEE WALDEN	)	Clerk of the
Defendants	)	Gibson Circuit Court

MEMORANDUM OPINION AND JUDGMENT ON AGREED CASE

This case comes before this Court upon the Submission of an Agreed Case by the parties herein, pursuant to Indiana Code 1971, Section 34-1-29-1 *et seq.*, with the necessary facts and Record, as defined in that statute. It is believed reiteration of the facts or of the Record are unnecessary except for reference.

The Trial Court wishes to express its gratitude to counsel for Plaintiffs, Defendants, Attorney General of the State of Indiana and Intervenor for their scholarly Briefs in this complicated legal issue.

The essential decision necessary in this case is to determine whether or not the so-called Indiana Mineral Lapse Statute being I.C. 1971, 32-5-11-1 *et seq.*, is constitutionally acceptable. If as contended by plaintiff it is unconstitutional, then plaintiff will prevail by judgment. If constitutional, there must necessarily be judgment for the defendants.

This Court feels that a short statement of matters of concern by way of Memorandum may be helpful to those affected by this Decision, as well as those reviewing the action of this Court.

It cannot be rationally doubted that the State of Indiana reserves the right inherent in this organized society to act in the public welfare; even to the extent of impairment of private contract. *Home Building and Loan v. Blaisdell,* (1934) 290 U.S. 398. As a general proposition of Constitutional Law, however, this Court believes the U.S. Supreme Court normally will abstain upon issues relating to the contract laws of the individual States. However, there are discussions in cited cases as to the principles, *Blaisdell, supra.*

It should be noted in the Agreed Facts of this case that we are not discussing an issue of murky titles, or long-lost owners of interests. There is no "cloud" on the title to this real estate, except to the extent that the Statute challenged poses such a cloud. This Statute *creates* a challenge to vested property rights, by the statutory terms of non-use or failure to register. At Common Law, there could be no termination in mineral rights as a separate estate from the fee. The question then becomes, first: can the Indiana Legislature create such a challenge, and second: has the Legislature in this Statute done so in a Constitutionally acceptable manner.

This Court does not question that the Legislature had a valid purpose in passage of this Statute, i.e., exploitation of the State's energy sources, but the method chosen is believed to be unconstitutional.

As stated, very scholarly arguments are advanced for the proposition that the Statute is Constitutional. All of these arguments fail to answer the basic inequitable result in this case, that a judgment for the surface rights owners would give them a demonstrably valuable asset in derogation of their contractual purchase, with no notice to the mineral rights owners, and no compensation to the valid owners for their loss.

Suppose the State of Indiana had been the takers of these rights from the mineral owners for distribution to someone who would exploit them, arguably for the common good.

Would not Constitutionally there be a requirement of notice to the mineral owners, a right of hearing, some form of compensation, as, for example, the tax sale of real estate?

It seems clearly the law in this Country that before property rights can be taken from persons, these persons have some rights as to notice and hearing. The subject matter would govern what procedural requirements are involved, but Constitutionally it would seem the hearing would revolve around the facts essential to determination of the controversy. *Bell v. Burnson* (1971), 402 U.S. 535; *Mullvane v. Central Hanover Bank and Trust Co.* (1950), 339 U.S. 306; *Goldberg v. Kelley* (1970), 397 U.S. 254.

Another unresolved question is, what harm would result had the statute required notice been given the mineral owners prior to the drastic severage and delivery of ownership from the mineral owner to the surface owner, at least such notice as is contemplated in *Mullane, supra*? It would perhaps induce litigation, but one queries whether that is not already the case with the statutory framework existing. The notice provision in I.C. 1971, 32-5-11-6 would seem just as precipitating a rule as would be notice prior to the legislative taking. Expediency is not always justice, whether the end sought is laudable or not.

For the reasons stated herein, this Court finds, Indiana Code, 1971 32-5-11-1, *et seq.* being Acts 1971, P.L. 423 is unconstitutional, void and of no effect.

This Memorandum of Opinion constitutes the Findings of Fact and The Conclusions of Law of This Court.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the Plaintiffs herein and against the Defendants, that Plaintiffs shall recover their costs expended, that Plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the Agreed Facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests.

Judgment accordingly.

/S/ Walter H. Palmer
WALTER H. PALMER, JUDGE
GIBSON CIRCUIT COURT

(Opinion of the Supreme Court of Indiana)

Short v. Texaco, Inc.

Cite as, Ind., 406 N.E.2d 625

Louise F. SHORT, Appellant,

v.

TEXACO, INC., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Braselton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, De-Beers Diamond Investment, Ltd., Appellees,

State of Indiana, Intervenor.

Ulysses G. WALDEN, Jr. and Carolyn Sallee Walden, Appellants,

v.

Eden H. POND, Edna H. BOBE and Consolidation Coal Company, Appellees,

Louise F. Short, Intervenor.

Nos. 179S23 and 1278S303.

Supreme Court of Indiana.

June 23, 1980.

DeBRULER, Justice.

The trial court declared Ind. Code §§ 32-5-11-1 through 32-5-11-8, the Mineral Lapse Act, unconstitutional. The Act puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years. The "use" of a mineral interest which continues it in force includes actual production, payment of rents, royalties or taxes, or the filing of a claim in the dormant mineral interest record in the recorder's office. It granted owners of mineral interests a two year period of grace after its effective date in which to file the claim and preserve the interest. This is an appeal from two judgments below, consolidated here, that termination of an interest under the Act is contrary to due process, equal protection, and the guarantee of just compensation for property taken by the State.

The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use.

The trial court concluded that the legislative purpose of the Act is to facilitate the exploitation of energy sources and accepted such purpose as legitimate. While all its conclusions are not entirely clear, it went on to void the entire statute because it determined among other things that due process of law required the divestiture of the vested mineral interest to be preceded by due process notice and an opportunity to be heard.

[1] Interests or estates in oil, gas, coal and other minerals

lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources.

[2] Courts of this state and nation have always given due regard to constitutional constraints upon their authority to void statutes. In doing so in *Noel v. Ewing*, (1857) 9 Ind. 37, we said:

> "It is due from the judiciary to sustain and reconcile their enactments, if possible. We will not lightly conclude that the law-making power has either ignorantly or wilfully violated the constitution. To justify the Courts in declaring an act void, it must clearly subversive of that instrument. (Citations omitted.)
>
> They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law." 9 Ind. at 43.

We affirm again now in this case our adherence to this vital principle.

In *Chicago and North Western Transportation Co. v. Pedersen*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, the Supreme Court of Wisconsin voided a similar act which directed that mineral rights revert to the surface fee ownership if they were not registered or taxes had not been paid on them. That statute was deemed contrary to procedural due process in that the mineral interest owner was not given notice or an opportunity to be heard prior to the reversion of his interest to the

surface rights owner. That court relied upon *Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell v. Burson*, (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. The court below took the same tack in voiding the Indiana Act.

In *Mullane, supra,* primarily relied upon by the trial court, the United States Supreme Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> * * * * *
>
> An elementary and fundamental requirment of due process *in any proceeding* which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.) 339 U.S. at 313, 314, 70 S.Ct. at 656, 657.

In *Mullane* the bank petitioned a court for settlement of an account of a trust fund, and the sufficiency of publication notice to beneficiaries was the issue. Notice was due to the beneficiaries because a tribunal was about to adjudicate upon their property. The Mineral Lapse Act in contrast is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs. *Mullane* does not support the trial court conclusion that notice and hearing are due to a mineral interest owner prior to the occurrence of an extinguishment.

Bell v. Burson, supra, relied upon by the trial court

does not support the conclusion either. There a Georgia law provided that the driver's license of an individual motorist involved in an accident is to be automatically suspended without notice or hearing if security was not posted to cover the damages claimed by aggrieved parties in the accident report. In the course of holding this system violative of procedural due process the court specifically noted:

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. (Citations omitted). It does not follow, however, that the amendment also permits the Georgia statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the licenses." 402 U.S. at 539, 91 S.Ct. at 1589.

Thus, even in *Bell*, a case involving a different complex of social concerns, there is this language supportive of the Act under consideration. It would support as consistent with procedural due process a legislative enactment which declared no more than that all licenses issued by the state would cease to be valid on a date certain in the future unless proof of financial responsibility were filed. Cf. *Frost & Frost Trucking Co. v. Railroad Commission*, (1962) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101. Such a hypothetical statute would be very similar in operation to the Act being questioned in this case.

[3] The Act under question does not provide for any adjudicatory process by a court or administrative agency. The absence of such a provision is not, we think, invalidating. The Act simply spells out the conditions which when existing mandate the extinguishment of an interest. If a court should be called upon to determine whether such conditions arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an

opportunity to be heard. Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring by filing a statement of claim. *Anderson National Bank v. Luckett*, (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. That procedure is both simple and inexpensive. Based upon the foregoing analysis we do not find the case of *Chicago & North Western Transportation Co. v. Pedersen, supra,* persuasive.

The reasoning of the trial court and the cases relied upon by it do not warrant the conclusion that the Act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process.

[4, 5] The trial court also concluded that the extinguishment of mineral interests under the Act constituted a taking of property without due process of law. Judge Young for the Fourth District Court of Appeals summarized the due process analysis applicable here in *Foreman v. State ex rel. Department of Natural Resources,* (1979) Ind. App., 387 N.E.2d 455:

> "The government has the inherent power or 'police power' to enact laws, within constitutional limits, to promote order, safety, health, morals, and the general welfare of society . . . Property rights are not absolute and may be restricted by legislation which constitues a proper exercise of the State's police power . . . Legislation is a proper exercise of the police power when the collective benefit to the general public outweighs the restraint imposed . . . The methods or means used to protect the public order, health, morals, safety or welfare must have some reasonable relation to the purpose or end sought." 387 N.E.2d at 460.

Study of this Act reveals that its outstanding feature is its declaration that mineral interests are terminable. Whatever may be the exact legal dimensions of such interests, they are not greater than fee simple titles. Under the statute of

limitations and the law of adverse possession a fee simple title to land is terminable. The Mineral Lapse Act can be viewed as vesting legal title in the owner of the surface rights which is free of the mineral servitude when the conditions required by it exist. A statute of limitations vests legal title in an adverse possessor as against the true legal owner when the conditions required by it exist. *Brown v. Anderson*, (1833) 90 Ind. 93. Statutes of limitation are statutes of repose founded upon a rule of necessity and convenience and the well-being of society. *Chase Securities Corp. v. Donaldson*, (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. This Act is also based upon the same rule. Cf. *Love v. Lynchburg National Bank and Trust Co.*, (1965) 205 Va. 860, 140 S.E.2d 650. We do not disregard the distinctions between the two types of statutes. The element of possession is different. No cause of action has arisen in the owner of the mineral interest which is required to be prosecuted. Given these differences and aforementioned similarities, we believe that this Act is, according to its principal intent and effect, and for the purpose of constitutional analysis, analogous to acts of limitation which vests title to real and personal property.

[6] Acts of limitation are not per se unconstitutional as impairing the obligation of contracts or as denying a person property without due process of law. This is so even though they extinguish the right of the party having a true title and vest a perfect title in the adverse holder. *Hawkins v. Barney's Lessee*, (1831) 5 Pet. 457, 8 L.Ed. 190, is an early case upholding the validity of a seven year limitation upon actions to recover possession of land in Kentucky. In the course of that opinion it is said:

> "It is argued, that limitation laws although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and all law; it

> existed in a state of nature, and is only modified by society, according to the discretion of each commodity."

The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer or right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act.

[7, 8] In *Terry v. Anderson*, (1877) 95 U.S. 628, 24 L.Ed. 365, Chief Justice Waite stated the general rule regarding the manner in which statutes of limitation are received by courts:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. . . .
>
> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government, unless a palpable error has been committed." 95 U.S. at 632-633.

Indiana is in accord with the rule stated and the reasoning behind it. *Guthrie v. Wilson*, (1959) 240 Ind. 188, 162 N.E. 2d 79; *Sansberry v. Hughes*, (1910) 174 Ind. 638, 92 N.E. 783. In *Terry* the court held that the period of nine months and seventeen days given to sue upon a cause of action was not unconstitutional. In *Turner v. People of State of New York*, (1897) 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392, a statute declaring that past sales and conveyances by a comptroller for non-payment of taxes would be conclusively presumed regular six months after the effective day of the statute was

upheld as providing a reasonable period for bringing an action. Pursuant to Ind. Code § 32-5-11-4, owners of mineral interests are granted a minimum of two years in which to act to preserve their interests. Such a period of grace would constitute a reasonable time as contemplated by these cases.

In *Wilson v. Iseminger*, (1902) 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804, the United States Supreme Court upheld a statute which barred actions to recover ground rents and extinguished totally the right to recover further such rents, after twenty-one years had expired during which no declaration or acknowledgement of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after the passage of the act. The court held that the act gave a reasonable time to the owners of the ground rents for preserving their rights. This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration.

[9] The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts.

[10] The trial court's judgment is arguably based upon the conclusion that the statute effectuates a taking of property without just compensation contrary to the mandate of Art.

I, § 21, of the Indiana Constitution. We agree with appellant that extinguishment of mineral interest under this statutory scheme does not involve an exercise by the State of its power of eminent domain. The State through this statute is not actually taking the mineral interest for its own use and benefit. Consequently, Art. I, § 21, does not provide an applicable standard for review of this statute. *Buckler v. Hilt,* (1936) 209 Ind. 541, 200 N.E. 219; *Foreman v. State ex rel. Department of Natural Resources, supra.* Appellees point to *Evansville & Crawfordsville R.R. Co. v. Dick,* (1857) 9 Ind. 433, in which this Court stated:

> "[T]he legislature has no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." 9 Ind. at 436.

This statement in context gave support to the court's ruling that the power of eminent domain cannot serve as a source of immunity from suits for damages for injury to private property. The Mineral Lapse Act does not involve the injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain. It declares instead that a lapse of a mineral interest will occur in the event of specified conditions and circumstances. We are satisfied that substantive due process provides the proper standard for constitutional review of it.

[11] Appellant next contends that the trial court erred in concluding that the Act is violative of the guarantees of Art. I, § 23, of the Indiana Constitution and the Fourteenth Amendment of equal protection of the law by reason of the special treatment afforded certain owners of mineral interests described in Ind. Code § 32-5-11-5. That provision states:

> "Failure to file a statement of claim without the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within sixty days after receiving actual knowledge that such mineral interest had lapsed."

By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the Legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind. Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals. Minerals exist within the earth in strata and in formations which do not necessarily coincide with the manner in which man has chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and pro-

fitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interests and actually produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objectives of the enactment and is consequently not contrary to the requirements of state and federal equal protection.

[12] The Act seeks to remedy a situation thought to retard economic activity vital to the welfare of local communities and the general public as well. The classification erected does not involve a suspect classification or an impingement upon the exercise of a fundamental right, and consequently the traditional fair and substantial relation test is applicable to it. *Johnson et al. v. St. Vincent Hospital, Inc. et al., Inc.*, 404 N.E.2d 585 (1980); *Setup, et al. v. Indiana Housing Authority, Inc.*, 402 N.E.2d 1215 (1980). In this area of economic and social concern, legislative choices are entitled to a large degree of deference from the court. They are not required to be made with mathematical precision or along entirely logical lines. *Williamson v. Lee Optical of Oklahoma*, (1955) 348 U.S. 483, 487, 75 S.Ct. 461, 464, 99 L.Ed. 563; *Indiana Aeronautics Com'n v. Ambassadair Inc.*, (1977) 267 Ind. 137, 368 N.E.2d 1340.

> "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, e.g. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 42, 423, [72 S.Ct. 405, 407, 96 L.Ed. 469] (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans v. Dukes*, (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511.

There has been no demonstration made which convinces us that the classification of Ind. Code § 32-5-11-5 is invidiously dis-

criminatory of wholly arbitrary.

The judgments of the trial court here appealed from declaring the statute unconstitutional are reversed and the cases remanded to the trial court for enforcement of the Act.

GIVAN, C. J., and HUNTER, PRENTICE and PIVARNIK, JJ., concur.

SUPREME COURT OF THE UNITED STATES

No. 80-1018

Eden H. Pond, Edna H. Bobe and
Consolidation Coal Company,
Appellants.

v.

Ulysses G. Walden, Jr., et al.

APPEAL from the Supreme Court of Indiana.

The Statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

The case is consolidated with case No. 80-065, Texaco, Inc., et al. v. Louise F. Short, et al., and a total of one hour is allotted for oral argument.

March 23, 1981